

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2021 JAN 25 PM 1:49

JAMES THOMAS BURKE,

Petitioner,

v.

JIM BAKER,¹ STATE OF VERMONT
and DAVID E. TARTTER, ESQ. Assist.
Attorney General,

Defendants.

CLERK
BY 
DEPUTY CLERK

Case No. 5:19-cv-228

**ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION AND DENYING PETITIONER'S MOTIONS**
(Docs. 12, 17, 18, 25)

On November 29, 2019, Petitioner James Thomas Burke filed a petition for writ of habeas corpus seeking collateral review of his state court conviction for sexual assault. (Doc. 1.) This Petition follows a previous habeas petition filed in 2012 and denied in 2013. *Burke v. Pallito*, No. 2:12-cv-197, 2013 WL 6145810 (D. Vt. Nov. 21, 2013). In a Report and Recommendation dated December 19, 2019, ("2019 R & R"), Magistrate Judge Conroy recommended that the current Petition be denied as second or successive under 28 U.S.C. § 2244(b). (Doc. 3.) This court adopted the 2019 R & R and transferred the Petition to the Court of Appeals for a determination as to whether the Petition falls into one of the 28 U.S.C. § 2244(b)(2) categories allowing a second petition. (Doc. 8.)

By order dated March 27, 2020, the Second Circuit ruled that "Petitioner has made a prima facie showing that the requirements of § 2244(b)(2)(B) are satisfied." (Doc. 10 (Mandate).) Judge Conroy returned to a consideration of the merits of the Petition. On July 23, 2020, the state filed an answer and motion to dismiss. (Doc. 23.) Petitioner filed a response in August. (Doc. 24.) The motion to dismiss remains pending.

¹ The Clerk's office is respectfully requested to include Defendant Baker on the docket. Because Michael Touchette is no longer the Commissioner of the Vermont Department of Corrections, his successor Jim Baker is automatically substituted for Touchette. *See* Fed. R. Civ. P. 25(d).

In the meantime, Petitioner has filed multiple motions. These include a “Motion for a Transport Order Back to Vermont, or in the alternative, a Motion for an Order Allowing Petitioner Use of the Law-Library” (Doc. 12), an “Emergency Motion to Intervene and Motion for Recusal of Judge Conroy” (Doc. 17), and a Motion for Clerk’s Entry of Default (Doc. 18). In a Report and Recommendation dated December 14, 2020 (“2020 R & R”), Judge Conroy recommended denial of these motions. (Doc. 25.) In a filing dated December 28, 2020, Petitioner filed an “Opposition of No Transport Order Back to Vermont State and Reconsideration.” (Doc. 26.)

The court accepts Petitioner’s filing of December 28, 2020, as a timely objection to the 2020 R & R.

The court accepts and adopts the 2020 R & R. It painstakingly examines each of the issues raised by Petitioner. These include:

1. A motion to disqualify Judge Conroy. As the 2020 R & R explains, a disagreement with a legal ruling is not a sufficient basis for disqualification of a judge under either 28 U.S.C. §§ 144 or 455(b)(1). *See Liteky v. United States*, 510 U.S. 540, 555 (1994). Petitioner has supplied no affidavit or other evidence of personal bias or prejudice. He has identified only his disagreement with the content of Judge Conroy’s rulings. Such a disagreement, however sincere and strongly felt, is not a basis for disqualification.
2. A motion seeking return to Vermont or, in the alternative, improved access to the law library at the Tallahatchie County Correctional Facility (“TCCF”) in Mississippi where he is currently confined. This motion was properly denied on grounds of exhaustion because Petitioner had not presented these arguments first in state court and because Petitioner’s diligence in filing multiple motions while a resident at the TCCF demonstrates his current access to legal materials.
3. Entry of default. The state respondents filed an answer before the expiration of an extension ordered by the court.

CONCLUSION

For the reasons discussed, after careful review of the file, the 2020 R & R, and the Petitioner's subsequent filing, this court ADOPTS Magistrate Judge Conroy's recommendations (Doc. 25.) The motions identified as Documents 12, 17, and 18 are DENIED. This case is returned to Judge Conroy for consideration of the merits of the Petition and the remaining pending motions.

Dated at Rutland, in the District of Vermont, this 25th day of January, 2021.



Geoffrey W. Crawford, Chief Judge
United States District Court